

CALLISTER, DUNCAN  
& NEBEKER

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

SUITE 800 KENNECOTT BUILDING

SALT LAKE CITY, UTAH 84133

TELEPHONE 801-530-7300

FAX 801-364-9127

LOUIS H. CALLISTER  
ADAM M. DUNCAN  
JOHN PARSONS<sup>1</sup>  
GARY R. HOWE  
L. S. McCULLOUGH, JR.  
FRED W. FINLINSON  
DOROTHY C. PLESHE  
JOHN A. BECKSTEAD<sup>2</sup>  
JEFFREY N. CLAYTON  
JAMES R. HOLBROOK  
STEVEN L. INGLEBY  
CHARLES M. BENNETT<sup>3</sup>  
W. WALDAN LLOYD  
JAMES R. BLACK  
H. RUSSELL HETTINGER  
JEFFREY L. SHIELDS  
STEVEN E. TYLER  
RANDALL D. BENSON  
R. WILLIS ORTON  
RUSSELL C. KEARL  
GEORGE E. HARRIS, JR.<sup>4</sup>  
ANDREW C. HESS<sup>5</sup>

ROBERT N. WILKINSON  
T. RICHARD DAVIS  
SCOTT A. CALL  
DAMON E. COOMBS  
JOHN P. MULLEN  
PAUL R. INCE<sup>6</sup>  
DAVID W. SCOFIELD  
BRIAN W. BURNETT  
SUSAN BLACK  
ANDRÉS DIAZ  
LYNDA COOK  
JOHN H. REES  
MARK H. EGAN  
P. BRYAN FISHBURN  
RICHARD L. KING  
JAN M. BERGESON  
DAVID R. WRIGHT  
ELIZABETH A. DALTON  
MATTHEW G. COOPER  
RONALD F. PRICE  
JOHN B. LINDSAY

<sup>1</sup>ALSO MEMBER WASHINGTON, D.C. BAR  
<sup>2</sup>ALSO MEMBER ARIZONA BAR  
<sup>3</sup>ALSO MEMBER FLORIDA BAR  
<sup>4</sup>ALSO MEMBER MISSOURI BAR  
<sup>5</sup>REGISTERED PATENT ATTORNEY  
<sup>6</sup>ALSO MEMBER CALIFORNIA BAR

OF COUNSEL  
FRED L. FINLINSON  
CRAIG F. McCULLOUGH  
RICHARD H. NEBEKER  
EARL P. STATEN  
R. DUFF THOMPSON

WAYNE L. BLACK & ASSOCIATES  
PARNELL BLACK (1897-1951)  
WAYNE L. BLACK, P.C.

LOUIS H. CALLISTER, SR.  
(1904-1983)

TO CALL WRITER DIRECT

September 11, 1991

RECEIVED

SEP 13 1991

WATER RIGHTS  
SALT LAKE

Robert L. Morgan, P.E.  
Utah State Engineer  
Division of Water Rights  
1636 West North Temple  
Salt Lake City, Utah 84116

Re: Distribution of Pinto Creek Waters, and the proposed  
Escalante Valley Adjudication

Dear Mr. Morgan:

At the May 23, 1991 hearing called as a result of Mr. Thorpe Waddingham's April 24, 1991 letter, you requested that interested parties submit comments regarding the proposed distribution of Pinto Creek waters pursuant to the July 16, 1962 Stipulation, hereinafter referred to as the "Stipulation". Ivan Cannon, Rex Gubler and Irvin Ence submit the following comments in opposition to the distribution of Pinto Creek waters as proposed in the Stipulation.

Statement of Material Facts

1. Settlement History

The community of Pinto is located in northern Washington County, Utah. It was first settled and water use commenced in 1860. As the community started to grow, additional ranches, four to be exact, were settled in the canyon below the Pinto fields and the Escalante Valley. Then in approximately 1905 or 1906, the Newcastle area was settled by individuals who originally came from Pinto. The water first used in Newcastle was used by N. D. Forsythe, R. C. Knell, Thomas Platt, and Walter and Frank Knell. See Exhibit "A", Statement by James Claude Knell.

2. Water History

The primary rights on the Pinto are all diligence rights, all claimed before 1903. There are a few rights filed and certified after

1903, but they are all junior to the diligence rights. The water was used first in the Pinto fields, known as the Middle Hayfield, the Heard House, the Lower Hayfield, and the Castle. These early settlers used all of the water in the Pinto Canyon at these fields, the high water, the normal flow and the springs. The next use was at the Ronald H. Knell ranch in 1881 and in 1890 by the Platt ranch. These ranches are in the Canyon below the Pinto fields and above Newcastle.

Eventually the settlers moved into the Newcastle area and started to irrigate with diversion canals, using the surplus water from Pinto Creek. See Exhibit "B", the March 1, 1907 applications filed by the first settlers in the Newcastle area. These applications all indicated that the water filed on was high water or excess water because the normal flow was duly appropriated. To facilitate the development of the Newcastle area, the Deseret Reclamation Company was formed. In 1913 one share of water was deemed sufficient by the Department of Interior to irrigate one acre. The Deseret Reclamation Company built two canals for \$2,000 in 1907 and 1908. Title to the use of the water of Pinto Creek was, according to the special agent of the Department of Interior, acquired by permit from the Utah State Engineer with their filed applications #1395 and #1396 for 15 and 33 cfs of unappropriated waters of Pinto Creek. The applications are Exhibit "B" and Letter from the Department of Interior is Exhibit "C".

With the proposed settlement of Newcastle, interest was created in a transbasin diversion from the waters of Grass Creek, a tributary of Santa Clara. Some time after the turn of the century, a tunnel was contemplated that would connect Grass Valley with the Pinto drainage to transfer high water from the Santa Clara drainage into Pinto Creek. There is some question about when this tunnel was completed and the first transfer of water actually occurred. In 1912, a diversion ditch was constructed in Grass Valley, but the work on the tunnel was not started at that time. In 1922, the Grass Valley Irrigation Company was incorporated and most likely the tunnel was completed thereafter and the water diverted. The water from Grass Valley was used to supplement the flow of water in Pinto Creek. The Platt ranch obtained 778 shares of stock in the Grass Valley Irrigation Company. The water from Grass Valley and Pinto Creek after being used at Pinto and in the canyon ranches was then used to irrigate a substantial amount of acreage in the Newcastle area belonging to the stockholders of the Grass Valley Irrigation Company.

In 1956 a reservoir was constructed just upstream from Newcastle and the Newcastle Reservoir Company was formed by merging the Desert Reclamation Company and the Grass Valley Irrigation Company. In the Articles of Incorporation creating the Newcastle Reservoir Company which were filed on the 12th of July, 1955, stock in the new company

was issued to the stockholders of the two previously mentioned companies as follows: To the stockholders of Grass Valley Irrigation Company, one share of the new company for every five shares, and to the stockholders of the Desert Reclamation Company, one share of the new company for every share of the holder company. Based on this formula, Mr. Cannon predecessor, Warren Platt received 208.30 shares of stock in the newly formed Newcastle Reservoir Company.

In 1942 the State Engineer started an adjudication of water rights in the Escalante Valley in the Fifth District Court in Iron County, Civil No. 4415. In 1943, a number of water users filed claims with the District Court and also with the State Engineer. For many of these claims, this filing was the first document filed in the office of the State Engineer relative to these claimed diligence rights. In 1961 a "proposed determination" was prepared by the State Engineer and filed with the Court in the adjudication matter. In 1962, the Stipulation was signed by the parties and filed with the Court. In 1968 an amended Stipulation was proposed, but it appears that it was never filed. A pretrial order was entered by the Court on August 27, 1970. Not much has happened with the adjudication since, although an Order Withdrawing Election Orders was issued October 2, 1989. The files of this case now fill up over 13 boxes in the archives of the Iron County District Court.

3. Problems with the 1961 Proposed Determination and the 1962 Stipulation.

- a. WUC 71-405 purports to provide the Newcastle Reservoir Company with an 1860 priority on 4 cfs for alternating weeks with the Pinto Irrigation Company. This is the alleged reason for the Stipulation providing for alternate weeks of use between Pinto Field and the Canyon ranch water users and the Newcastle water users. When the record is examined closer, there is no record that the water users of Pinto Creek ever alternated one week use on Pinto Creek except for the one year after the Stipulation. See Exhibit "D", the June 24, 1991 Letter on behalf of the Pinto Irrigation Company to the State Engineer. It just didn't work. Any right, if it ever existed, is extinguished by the failure to use the right, with the exception of one year since 1860.

This claim is alleged to have been transferred from the Pinto fields to Newcastle in 1917. No record of the transfer deed shows of record in the office of the Washington County Recorder, nor does it appear in the record of the State Engineer. After 1909, both conveyances and point of diversion transfers have to be filed with the State Engineer

in order to be valid transfers. No documents exist that counsel for both the Pinto Fields Irrigation Company or Mr. Cannon, Gubler and Ence have been able to find. The only notation in the State Engineer's file is a note on a change application, #a3023, which was filed August 30, 1955 and which alleges that the transfer occurred in 1917.

If the transfer occurred, there was not a corresponding reduction in the acreage at Pinto Fields that was reduced from irrigation. It appears that this acreage is now counted twice, once in the Pinto Fields and, since 1955, at Newcastle.

- b. The hydrology of the canyon has not been sufficiently documented. The history of Pinto Creek has been one of diversion, irrigation and return flow. The sequence is then repeated at each ranch at each successive diversion, often the stream is completely dammed off. Yet at the next diversion, water is once again ready to be diverted. This summer readings were actually taken by Cannon and others with those results being provided herein. It shows that there is a substantial return flow in the Creek. This high level of return flow is the reason alternating turns on the Creek were not necessary. Once these readings are adjusted to add back the lost in the canyon incurred in transportation which should always be allocated to the next lower user, Newcastle is able to use essentially the same amount of water that is available at the higher Pinto Field diversions. Newcastle does get the benefit of all the water in the creek not being used consumptively, but it is the return flow in the canyon that is the water that has always been used for irrigation in the Newcastle area. It is clear that the storage rights in the Newcastle Reservoir has greatly enhanced the water available for the Newcastle area.

#### Return Flow Study

This study or reading of the weirs in the Pinto Canyon was done during the month of July and August on the dates and at the times provided herein. The numbers reflect that actual numbers on the weir and not necessarily the actual CFS. Since the readings were taken in the hottest time of the summer, the flows are their lowest and represent the prime low yield rights. It would be very helpful if an accurate hydrological study were done to identify the actual amount

of the return flow so that accurate ruling could be developed by the State Engineer.

Time&Date	Pinto E. Weir Size	Pinto W. 18"	Knell 9"	Platt 9"	Tullis 9"	Harrison 18"
5p7/10/91	5.0		4.5	2.5	3.5	3.5
Measured by Rex Gubler & Irvin Ence						
3p7/13/91	5.2		3.6	4.4	2.8	3.4
Measured by Ivan Cannon, Rex Gubler & Irvin Ence						
4p7/17/91		4.0	3.4	2.2	3.4	2.8
Measured by Rex Gubler & Irvin Ence						
4p7/20/91		3.9	2.8	2.4	3.4	2.8
Measured by Rex Gubler, Irvin Ence, Arthur Snow & Ivan Cannon						
2p7/24/91		3.9	3.4	3.0	2.4	2.9
Measured by Rex Gubler & Irvin Ence						
7p7/27/91	4.8		3.2	2.6	2.6	3.0
Measured by Lane Gubler, Irvin Ence & Ivan Cannon						
2p8/4/91	5.0		2.6	2.8	2.8	2.8
Measured by Rex Gubler, Brent Ence & Ivan Cannon						

- c. The Acreage in the 1961 proposed determination for WUC 71-107 and 71-409 states that these 1890 claims are for water used to irrigate 20.5 acres and then the State Engineer requires that these claims will be limited to the irrigation of 14.6 acres. When the records of the State Engineer are examined there is no additional information that indicates why this recommendation was made except for an exceptional showing of three purported WUC's that have apparently been filed both in the Adjudication and in the State Engineer's files for these claims.

The original WUC was filed by Robert Platt. It was logged in the State Engineer's office, October 2, 1943. See Exhibit "E". It was typed and apparently prepared by an attorney in Cedar City by the name of Shay, who transmitted the same to the State Engineer's office and filed it with the Court pursuant to the Summons. This initial WUC claims that the water at the Platt ranch was used to irrigate 24 acres at its maximum. This particular WUC is scribbled out in red ink and signed in red by Gordon Knell, an official of the Newcastle

Reservoir Company and the "water master" for the Newcastle water users. Gordon also has written "void" on this WUC and signed his name. In the same red ink, it is written on this original WUC that an amended WUC is attached with a signature that purports to be Robert Platt.

The attached WUC reduces the acreage to 13.15 acres, although when the two different acreage are added, the sum of the two parcels is 13.14. See Exhibit "F". This particular WUC is filled out completely in handwriting. A third WUC is on file and it purports to be an amended WUC prepared by the State Engineer. See Exhibit "G". This WUC however is not signed, dated or notarized. But it sets forth the claim upon which the 1961 proposed determination is based. The acreage irrigated is identified by tract and the amount set at 20.5, but this acreage for both WUC's 1-107 and 419 is limited to 14.6 acres. There is nothing other than the altered WUC and the amended WUC that suggests why 14.6 is used. The original is for 24, the 2nd is for 13.15 and the one apparently used by the State Engineer is 14.6.

When other WUC's were reviewed in the office of the State Engineer, correspondence indicated that a number of WUC's for Pinto Creek were returned by the State Engineer to a Newcastle residence, so that corrected claims could be filed. It may have been on this return, that the Platt claim was voided by Gordon Knell and the 2nd WUC completed, reducing the acreage from 24 to 13.15. After this amended WUC was filled, the State Engineer amended the amended WUC by asserting that the acreage irrigated was 20.5 instead of any of the other numbers; however, the State Engineer then limits to 14.6 without any record of why this number was selected.

The chain of title for the Platt Ranch proceeds from the patent from the United States of America to Robert Platt; who then conveyed with his wife Eathel to R. Warren Platt. R. Warren Platt and his wife Bea conveyed a 1/2 interest to Lester B. Riding and a 1/2 interest to Arthur F. Crosby and his wife Iris W. Crosby. Lester B. Riding conveyed his 1/2 interest to Arthur R. Crosby and his wife Iris W. Crosby. The Crosby's then conveyed to Ivan B Cannon and his wife Helen C. Cannon, who still are the owners today of the Platt Ranch.

The Stipulation was signed in 1962 by the some of the users of Pinto Creek water. Lester B. Riding signed for the Platt ranch water interest, but did not have the authority to sign

for Arthur R. Crosby. Crosby initiated steps to buy out the 1/2 interest of Riding and was successful in 1968. Crosby then petitioned the Court and then objected in the adjudication to the 1961 proposed determination because of the restriction of acreage from 20.5 to 14.6. This objection was filed by Sam Cline, see Exhibit "H". It was accompanied by a hydrographic survey, compiled by a different Robert Platt of Cedar City. This survey indicated that the land irrigated at the Platt ranch was in fact 19.76 acres rather than 20.5 or 14.6.

The court has not ruled on this claim, but in the Pretrial Order filed in the Adjudication on the 27th of August, 1970, Judge James P. McCune defined the one of the issues to be resolved was Crosby's objection:

"The issue presented here is whether protestant has a valid diligence right for the irrigation of 20 acres of land. The State Engineer has limited protestant's right under Water User's Claim no. 419 to the irrigation requirements of 14.60 acres of land. It is the contention of the State Engineer that the Revised Determination is in accordance with the Original Proposed Determination and prior orders of this court which limit protestant's right and that, in any event, protestant has not established a valid diligence right to the extent of the use now claimed."

Unless the State Engineer has information beyond that shown in WUC # 71-107 or 71-419, there is no indication other than the amended claim, scribbled on by Gordon Knell, a person with a water use conflict, that the acreage was not 24 acres. The State Engineer acknowledges that the acreage actually irrigated was 20.5 in his amended Claim, Exhibit \_\_\_\_\_ and in the 1968 survey, in the opinion of a license survey engineer, the amount of acreage is actually irrigated is 19.76. A number far closer to 20.5 than 14.6.

4. Recommendations of Cannon, Gubler, Ence

That the State Engineer delete from any proposed adjudication of water rights for the Pinto Creek, the requirement to alternate the flows of Pinto Creek each week between the users at Pinto Fields and in the Canyon, with those in the Newcastle area, i.e. the Newcastle Reservoir Company. The Pinto Irrigation Company has also filed a protest to the proposed determination as well as to protest a request to operate Pinto Creek as per the requirements of the Stipulation. All of the parties, The Pinto Fields

Irrigation Company and the Canyon ranches, challenge the validity of the transfer from Pinto to Newcastle and especially challenge the one week alternate flow concept.

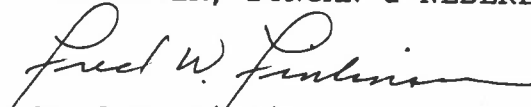
5. Recommendations of Cannon

That the State Engineer review the proposed determination to see if there was ever any information that limited the Platt ranch acreage to 14.6 acres. Based on the search efforts of Cannon to date, there does not seem to be any legitimate evidence that the Platt ranch was restricted to only watering 14.6 acres. The original WUC was for 24 acres. The State Engineer's own amended WUC indicates that the actual amount of acreage irrigated was 20.5 acres. This acreage identified by the State Engineer on its amended WUC has been proven to be very close and accurate, when compared to the 19.76 acres identified when the survey was completed in 1969. It is the recommendation of Cannon that the State Engineer amend WUC 71-107 and 71-419 to include that acreage at 19.76 with out the restriction to 14.6.

If you have any questions about these comments please call. I would like to spend more time reviewing the change applications for the Newcastle Reservoir Company that were filed in 1955. It seems, at this time, that most of the senior priorities awarded to The Newcastle Reservoir on the Pinto Creek can be traced to these applications. For example, the water right in the Grass Valley creek is transferred to Pinto Creek and given a priority of 1880 and the tunnel was not completed until some time after 1922. Further no documents can be found that WUC 71-405 was ever properly transferred to The Desert Reclamation Company. Once you have had the opportunity to review these comments, the comments of Pinto Creek, and others, it would probably be appropriate for us to meet together again to discuss these issues. Please let us know of any such meeting.

Sincerely yours,

CALLISTER, DUNCAN & NEBEKER

  
Fred W. Finlinson